FILED
JUL 5 1941
ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 236

JOHN T. CLARKE,

Petitioner,

vs.

BARCLAY PARK CORPORATION, BARCLAY HOTEL CORPORATION, JOHN F. KROPPY, LESTER A. ABERLEY, EDWARD D. BRYDE, ARTHUR D. AMON AND RUSSELL C. MACFALL, COPARTNERS DOING BUSINESS AS ABERLEY, BRYDE, MACFALL & AMON; A. JOSEPH GEIST, GEORGE E. NETTER AND MORRIS A. MARKS, COPARTNERS DOING BUSINESS AS GEIST & NETTER; WILLIAM NETTER AND ROBERT NETTER, COPARTNERS DOING BUSINESS AS NETTER & NETTER; CHARLES D. HOFFMAN AND SAMUEL HOFFMAN, COPARTNERS DOING BUSINESS AS HOFFMAN & HOFFMAN, AND A. DAVID BENJAMIN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN T. CLARKE,
Pro se.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of John T. Clarke respectfully shows to this Honorable Court:

The petitioner prays that a Writ of Certiorari issue to review the orders of the Circuit Court of Appeals for the

Second Circuit entered in the above cause on February 7th, 1941, and February 25th, 1941.

(1) Denying petitioner's motion for leave to appeal to said Circuit Court of Appeals under Section 250 of the Chandler Act; and

(2) Dismissing petitioner's appeal theretofore taken under said section of the Chandler Act, respectively.

Opinions Below.

No opinion was handed down by the Circuit Court of Appeals in connection with said orders. The decisions of the court below are not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., 347 (a).

The dates of the orders to be reviewed are February 7, 1941, and February 25, 1941, respectively (R. 36, 6). Upon motion of the petitioner, this Court, by Mr. Justice Stone, on May 1, 1941, granted an extension of thirty days from May 7, 1941, within which this petition for certiorari might be filed and on May 24, 1941, a further extension of thirty days to and including July 6, 1941, was granted by order signed by Mr. Justice Stone (R. 37).

Petitioner contends (1) that in granting respondents' motion to dismiss his appeal from the order of District Court filed August 19, 1940, awarding allowances to the respondents and (2) denying his motion for leave to appeal from said order, the Circuit Court of Appeals decided said motions in a way probably in conflict with the decisions of this Court in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group et al.*, 61 S. Ct. 331, and *Cowan* v. *Dickinson Industrial Site*, 309 U. S. 382.

Questions Presented.

(1) Under the circumstances of this case should not petitioner's appeal have been allowed and the motion to dismiss the same denied, under the rule in the *Prudence* case (*supra*).

(2) Under the circumstances of this case should not petitioner's motion for leave to appeal have been granted under the rule of the *Prudence Case* (*supra*) and *Cowan* v. *Dickinson* (*supra*).

(3) Was not the action of the Circuit Court of Appeals, in view of all the circumstances, an abuse of discretion entitling petitioner to a review by this Court.

Statutes.

The only statute involved is Section 250 of the Chandler Act, 11 U. S. C. A., Section 650, set forth in the Appendix *infra,* page 13.

Statement.

On April 18, 1935, the debtor above named, filed its petition for reorganization pursuant to Section 77-B of the Bankruptcy Act in the United States District Court for the Southern District of New York, and on said date an order of said Court was made, approving said petition and temporarily continuing the debtor in possesion of its properties. Thereafter on May 16, 1935, said order continuing the debtor in possession was made permanent and creditors were ordered to file proofs of claim on or before July 1, 1935.

A plan of reorganization dated March 31, 1936, was subsequently approved by the Court but on appeal to the Circuit Court of Appeals for the Second Circuit the order of the District Court, approving said plan of reorganization, was reversed on the ground that it was unfair, unreasonable and inequitable in that stockholders of the debtor were

allowed to participate in the reorganized company without payment or assessment of any kind although the debtor was hopelessly insolvent. *In re Barclay Park Corp.*, 90 Fed. Rep. (2nd) 595.

Petitioner is an owner of a substantial amount of the $1,068,000 issue of First Mortgage bonds secured by a lien upon the lease to the debtor from the New York State Realty and Terminal Company and upon the furniture, furnishings and equipment of the Hotel Barclay on East 48th Street, New York City, which was built on the leased premises (R. 34, 8).

Petitioner spent considerable time in looking into the affairs of the debtor and joined with other bondholders in said appeal to the Circuit Court of Appeals. Petitioner guaranteed the necessary printing and secured the appeal bond and in addition petitioner employed counsel to file a brief on his behalf and on behalf of one other bondholder attacking the plan of March 31, 1936, as unfair and inequitable (R. 34, 8).

Following the reversal of the order confirming said plan in June, 1937, some of the creditor groups began to propose a new plan which petitioner deemed also unfair and inequitable because it contemplated that general creditors should share almost equally with secured creditors and made no provision for enforcing or adjusting the rights of the bondholders with respect to the furniture, furnishings and equipment. The latter were subject to an alleged chattel mortgage made by the debtor's subsidiary (R. 34, 8). Petitioner questioned the validity of said mortgage and the better to secure justice for the bondholders engaged counsel in July, 1937, and succeeded in having the plan referred to a Special Master (R. 32). Pending the hearings and report of the master, petitioner secured a court order effective November 1, 1937, enjoining the debtor from making further pay-

ments of $1,750 per month to the holder of said chattel mortgage (R. 32, 34).

The evidence presented to the Special Master and the briefs filed in support of petitioner's position were almost wholly the work of counsel employed by petitioner (R. 33). The Special Master thereafter filed a report recommending rejection of the proposed new plan on the ground that the chattel mortgage was invalid, and that the bondholders were entitled to a first lien on the furniture, furnishings and equipment of the debtor (R. 34).

Thereupon, an amended plan of reorganization dated July 20, 1938, was offered and later approved by the court which, among other things, recognized the priority of the bondholders to payment up to $170,000 out of a balance of $200,000 remaining unpaid on said chattel mortgage. In addition a fund in excess of $26,000 (being the accumulated payments of $1,750 per month over a period of 15 months) was made available for payment of allowances and disbursements of creditors and attorneys aiding the reorganization (R. 34, 8).

Thereafter hearings were duly held by the court on the applications for allowances made by the respondents and petitioner caused objections to be filed to the granting of same to certain of the applicants and particularly the respondents. On August 19, 1939, the court made an order, which among other things, made the following allowances:

Benjamin & Benjamin, Attorneys	$7,500
Geist & Netter and Netter & Netter, Attorneys	9,000
Joseph F. Kroppy, Attorney	6,000
Hoffman & Hoffman, Attorneys	2,000
Aberley, Bryde, MacFall & Amon, Attorneys	5,000.

On or about September 15, 1939, petitioner filed a notice of appeal from said allowances in accordance with the practice then current in the Second Circuit.

Subsequently this Court granted a Writ of Certiorari in the case of *Dickinson* v. *Cowan*, 309 U. S. 382, and in the decision in that case laid down the rule that an appellant must apply to the Circuit Court of Appeals for leave to appeal. However, shortly thereafter this Court also granted a Writ of Certiorari in the so-called *Prudence* case, 61 S. Ct. 331, decided by the Circuit Court of Appeals for the Second Circuit, and thereafter in January, 1941, reversed said decision of the Circuit Court of Appeals dismissing the appeals of certain of the objectants and applicants for allowances under the reorganization provisions of the Bankruptcy Act.

In the meantime certain of the respondents moved in the Circuit Court of Appeals to dismiss petitioner's appeal on the basis of the decision in *Dickinson* v. *Cowan* (*supra*) but the court adjourned the motion until after the above decision in the *Prudence* case and on February 3, 1941, heard said motion in conjunction with a motion made by petitioner, following the *Prudence* decision, for leave to appeal to the Circuit Court of Appeals from the order granting said allowances.

On February 7, 1941, an order of said court was made denying petitioner's said motion for leave to appeal and on February 25, 1941, an additional order was made by said court dismissing petitioner's appeal.

Specifications of Error to be Argued.

(1) The Circuit Court of Appeals erred in dismissing petitioner's appeal and in denying petitioner's motion for leave to appeal by failing to follow the decision of this Court in the *Prudence* case and in *Cowan* v. *Dickinson* (*supra*);

(2) The action of the Circuit Court of Appeals in dismissing said appeal and in denying said motion was an abuse of discretion which should be reviewed by this Court.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals granted respondents' motion to dismiss notwithstanding the decision of this Court in the *Prudence* case and the fact that the action which was taken by petitioner was due primarily to the uncertainty of the law and also notwithstanding the fact that respondents were not prejudiced by any delay.

Petitioner in good faith and as chairman of the new Bondholders Protective Committee for the First Mortgage Leasehold Bonds and believing that the allowances to the respondents were unwarranted and in one case excessive filed timely notice of appeal from the order granting said allowances.

In so doing petitioner followed the procedure outlined by the Circuit Court of Appeals for the Second Circuit to which the appeal was taken, in *London* v. *O'Dougherty*, 102 F. (2d) 524. In that case a motion for leave to appeal was denied and the appellant properly believed that the filing of the notice of appeal was the proper procedure.

In September, 1939, when the notice of appeal was filed the practice was still new and this Court had not passed upon the question. True, there was a decision rendered by the Circuit Court of Appeals for the Seventh Circuit in *In Re Dickinson*, 104 F. (2d) 771, which held that an application for leave to appeal, was the proper practice, but although an application for a writ of certiorari in the *Dickinson* case was pending at the time petitioner filed notice of appeal, no action was taken thereon by this Court until the writ was granted, November 6, 1939. This was long after the date when petitioner could have filed said notice of appeal.

Shortly after this Court decided the *Dickinson* case (*Dickinson Industrial Site, Inc.*, v. *Cowan*, 309 U. S. 382, 60 S. Ct. 595) petitioner applied to the Circuit Court of Appeals for leave to appeal, *ex parte*, and the application in

the then state of the law was denied (R. 34). Subsequently certain of the respondents moved, in October, 1940, to dismiss petitioner's appeal, but no action was taken by the court in view of the *Prudence* appeal to this Court, until February, 1941.

However, after this Court reversed the decision of the Circuit Court of Appeals in the *Prudence* case (*Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group et al.*, 61 S. Ct. 331) petitioner promptly applied for leave to appeal from the order granting said allowances (R. 7-13). Said motion was made on notice to respondents and was heard on February 3, 1941, in connection with respondents' motion to dismiss said appeal.

The Circuit Court of Appeals made its respective orders granting said motion to dismiss said appeal on February 25, 1941 (R. 6) and denying petitioner's motion for leave to appeal on February 7, 1941 (R. 36).

It is respectfully submitted that the instant case comes clearly within the rule announced by this Court in the *Prudence* case.

Here, as there, petitioners' procedure was irregular, but the defect not jurisdictional. Petitioner had filed notice of appeal and perfected the same by filing a bond in the sum of $250.

Nor can petitioner's good faith be questioned. Petitioner personally spent some $5,000 for counsel fees and for disbursements from the time the original plan of 1936 was questioned and finally rejected until the hearings on the allowances were completed (R. 34). Petitioner devoted a major part of his time from July, 1937, to August, 1939, to protecting the interests of the bondholders and through petitioner's efforts at least 20% of property value was added to each bond. Nor was the scope of the review altered or enlarged in the instant case nor any dilatory tactics employed. The petitioner was aware that all of the

allowances had been paid summarily before taking his appeal, but in the interests of justice and equity for the bondholders decided to attempt to have the improper allowances set aside. Nor could petitioner be expected to expend additional large sums to bring on the appeal during the pendency of the litigation in this Court affecting the very procedure on which he would be expected to proceed. Nor is it frivolous to attempt to show an abuse of discretion in the District Court in awarding large fees for services which merely duplicated each other.

Petitioner submits that the language of Mr. Justice Douglas, in the *Prudence* case at p. 333 is peculiarly applicable in the instant case:

> "Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of London v. O'Dougherty, supra."

(2) Petitioner, however, went beyond the petitioners in the *Prudence* case in his efforts finally to secure leave to appeal. Petitioner first requested *ex parte* leave to appeal as set forth above and thereafter moved, on motion to respondents, for leave to appeal.

As this Court pointed out in the *Prudence* case, (*supra*) page 333, while the appeals under Section 250 must be "taken to" the Circuit Court of Appeals within the time allowed in the act, there is no requirement that they be allowed within that time. Hence, in view of all the circumstances petitioner was correct in moving for leave to appeal, after the decision in the *Prudence* case, and it was a denial of substantial justice to deny petitioner's motion therefor, where petitioner was misled into not making said motion at an earlier date by the court's own decision in the *London* v. *O'Dougherty* case (*supra*).

(3) The petitioner had made out clear *prima facie* case of abuse of discretion, within the rule set forth in the opinion of this Court in the *Dickinson* case (*supra*) at page 389, where the Court said:

> "For certainly it seems sound policy to require fiduciaries to make out a prima facie case of inequitable treatment in order to be heard before the Appellate Court."

It is a matter of record that the lease was of slight value. *In re Barclay Park,* 90 F. (2d) 595. The debtor was hopelessly insolvent. It owed bondholders $1,068,000 principal plus interest at 6½% from December 1, 1931, noteholders $1,125,000 principal, plus interest at 7% from December 1, 1930; other creditors in excess of $89,000; landlord $1,923,847, as arrears of rent and $664,000 in arrears of amortization of principal. As against this huge indebtedness in excess of $4,800,000 there was available for all classes of creditors the following, a prior lien in favor of the bondholders against the furniture, furnishings and equipment of $170,000, and a similar lien in favor of the former chattel mortgage of $30,000; an insubstantial amount of free assets consisting largely of accounts payable, cash and unencumbered personal property; and some $26,000 in earmarked cash resulting from an accumulation of the monthly payments of $1,750 each, enjoined by petitioner. The treasury of the debtor was so depleted of cash that it was necessary to provide in the plan that allowances be paid out of current income and money earmarked as rentals.

However, notwithstanding that the sound assets available for payment of more than $4,750,000 of claims was less than $250,000, the Court allowed in excess of $46,000 to committees and counsel.

The persons receiving the above allowances included the respondent Kroppy, who received $6,000, representing the Bondholders Protective Committee from January, 1938, to

the date of the plan, July 20, 1939, and on the hearing for confirmation thereof.

Three additional firms of attorneys, Netter & Netter, Geist & Netter, A. David Benjamin and Hoffman & Hoffman all representing individual bondholders, who received respectively, $9,000, $7,500 and $2,000.

Thus even assuming that the bondholders ultimately may receive about 10% on their investment, the recovery of almost the entire amount was due to petitioner's efforts and not to said attorneys, who, at most, assisted in preparing a plan which conceded control of the new corporation to unsecured noteholders, so that the value of their services to the bondholders whom they reported was small.

The allowance to Messrs. Abberley, Bryde, MacFall & Amon was appealed from not because of any lack of diligence or effort on their part, but because their services were rendered on behalf of the unsecured noteholders, who are now in control of the new corporation and said attorneys should have been paid by their clients under a long line of judicial decisions and not out of the residual equity remaining for the secured bondholders. In addition said attorneys were appointed attorneys for the new corporation and their present retainer should be sufficient compensation in so far as the estate of the debtor is concerned.

Conclusion.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Court directed to the Circuit Court of Appeals for the Second Circuit to review the orders made by said Court in the above matter, dated February 7, 1941 and February 25, 1941, respectively.

JOHN T. CLARKE,
Petitioner,
111 East 48th Street,
New York, N. Y.

July 3, 1941.